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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.W.P. No. 64 of 2007

Date of decision: 6.2.2007

M/s Shiwalya Spinning & Weaving Mills (P) Ltd, Ludhiana

...Petitioner

Versus

The State of Punjab and others

...Respondents

CORAM: HON'BLE MR.JUSTICE M.M.KUMAR
HON'BLE MR.JUSTICE RAJESH BINDAL

Present: Mr.Sandeep Goyal, Advocate for the petitioner.
Ms.Urvashi Dhugga, AAG,Punjab, for the respondents.

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RAJESH BINDAL, J.

The petitioner has filed the present petition praying for issuance of a writ in the nature of mandamus directing the respondents to issue refund voucher for Rs. 1,57,93,514/-, found to be refundable by the Assessing Authority while framing assessment vide order dated January 15, 2007.

Briefly the facts, as stated in the petition, are that the petitioner is a private limited company engaged in the business of manufacture of Acrylic Yarn made from the Acrylic Fibre, purchased from another unit, which is an exempted unit under the provisions of Section 30-A of the Punjab General Sales Tax Act, 1948 (for short ' 1948 Act'). The petitioner is also an exempted unit having been granted exemption certificate No.314

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dated May 2, 2001 for an amount of Rs. 9,69,97,717/- with validity from 15.9.2000 to 14.9.2007. While framing the assessment for the year 2005-06, keeping in view the judgment of this court in Civil Writ Petition No. 2272 of 2006 (M/s Perfect Synthetics Vs. The State of Punjab and others) decided on July 04, 2006, the Assessing Authority vide order dated January 15, 2007 determined a sum of Rs. 1,57,93,514/- being refundable to the petitioner, on filing of proper application. It was further mentioned in the order of assessment that Special Leave Petition having been filed by the State of Punjab against the judgment of this court in M/s Perfect Synthetics' case (supra), the refund shall be subject to decision of Special Leave petition and the amount so refunded shall be recoverable with interest, in case the judgment of this court is reversed by Hon'ble the Supreme Court. The petitioner applied for refund of the amount due to him but the same was not granted.

In response to the notice of writ petition, the respondents have filed a short affidavit admitting that a refund of Rs. 1,57,93,514/- has been determined vide assessment order dated January 15, 2007, however, in view of the order passed by the Excise and Taxation commissioner, Punjab under Section 41(1) of the Punjab VAT Act, 2005 (for short 'the VAT Act'), the refund has been withheld. Copy of the order has been placed on record as Annexure R-3. The relevant part thereof is extracted below:-

> "I have considered the facts and also perused the record of the case in the light of the section 41(1) of the Punjab VAT. The Section 41(1) of PVAT Act reads as under:-
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> > "41. (1) Where an order giving rise to a refund is the subject matter of an appeal or further proceeding or where any other proceeding under this Act is pending, and the officer competent to grant such refund is of the opinion that the grant of the refund is likely to adversely affect the revenue such officer may, with the previous approval of the Commissioner, withhold the refund till such time as may be determined."

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In the present case the refund has arisen for the reason that deduction u/r 29(xii) of PGST Rules, 1949 has been allowed in respect of goods purchased from exempted units for use of manufacture. This has been done complying with the order of Hon'ble Punjab and Haryana High Court in C.W.P. No.2272/2006 in the case of M/S Perfect Synthetics. The Department has filed S.L.P. before Hon'ble Supreme Court of India and notices have already been issued to the respondents including the present dealer M/S Shiwalya Spinning & Weaving (P) Ltd., who had also filed caveat. Therefore, the order which has given rise to refund is subject matter of appeal by way of S.L.P. Prayer for stay of the operation of the order dated 4.7.06 passed by Hon'ble Punjab and Haryana High Court in C.W.P. No.2272/06 has also been made. The revenue involved in the case is substantial. Asstt. Excise and Taxation Commissioner-1 has recommended that refund will adversely affect the recovery. In view of the position detailed above, I agree with the recommendation of the Asstt. Excise & Taxation Commissioner. Approval for withholding the refund of Rs. 1,57,93,514/- to M/s Shiwalya Spinning & Weaving Mills (P) Ltd., till decision of SLP is, therefore, granted u/s 41(1) of PVAT Act, 2005."

A perusal of the order passed by the Commissioner, as extracted above, shows that the same is primarily based on the fact that as the judgment of this Court in M/s Perfect Synthetics' case (supra) is under appeal before Hon'ble the Supreme Court, and the same judgment being the basis for passing of order of refund, the amount should be withheld. Another reason given is that revenue involved in the case is substantial.

We have heard Shri Sandeep Goyal, learned counsel for the petitioner and Ms.Urvashi Dhugga, learned Assistant Advocate General, Punjab, for the respondents.

Reiterating the submissions made in the writ petition,

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learned counsel for the petitioner submitted that once the Assessing Authority has determined an amount of Rs. 1,57,93,514/- being refundable to the petitioner, it is entitled to refund thereof. It is further submitted that the Assessing Authority had rightly put a condition while ordering the refund and the petitioner would be bound by that. The petitioner having paid the amount as per the interpretation of law at the relevant time, under protest, is entitled to the refund thereof, once it is found to be refundable to the petitioner as per assessment order. The respondents have no authority, whatsoever, to withhold the amount. It is further submitted that reliance on the order passed by the respondents under Section 41(1) of the VAT Act is totally misplaced as the same is nothing else but arbitrary exercise of the powers by the authority. Even otherwise, the ingredients/ pre requisites for exercise of powers under Section 41(1) of the VAT Act are not available in the facts and circumstances of the present case. Accordingly, the order of withholding the refund also does not come to the rescue of the respondents.

On the other hand, learned counsel for the respondents submitted that the refund in the case of the petitioner has been determined on the basis of the judgment of this Court in M/s Perfect Synthetics' case (supra) and the judgment having not been accepted by the State, the same is under appeal before Hon'ble the Supreme court. Though the order passed by the Assessing Authority determining the amount of refund is not subject matter of any appeal or further proceedings but still the respondents are well within their right to withhold the refund as amount involved in the present case is substantial.

Having heard learned counsel for the parties and perusing the paper book, we are of the view that action of the respondents in not granting refund of the amount of tax determined as refundable to the petitioner in the order of assessment, is illegal, arbitrary and deserves to be struck down. Once it is not disputed that the amount has been determined being refundable to the petitioner, the only escape route with the respondents to deny the refund was to exercise the powers under Section 41(1) of the VAT

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Act. For the exercise thereof, certain pre-requisites are required to be satisfied. According to the provision the order of refund is either subject matter of appeal or pending consideration in any other proceedings under the 1948 Act. If this situation is existing, the officer competent to grant refund has to form an opinion that the grant of refund is likely to adversely affect the recovery. It is only then the refund due to the assessee can be withheld. The undisputed position in the present case on record is that the order of assessment determining the amount of refund due to the petitioner is not subject matter of appeal or any other proceedings under the 1948 Act. A Special Leave Petition against the judgment of this Court in M/s Perfect Synthetics' case (supra) is pending before Hon'ble the Supreme Court and as such opining that the order of refund subject matter of appeal by way of Special Leave Petition would not be correct. No proceedings against the order of refund are pending under the Act or any where else. As far as recording of satisfaction with regard to adverse affect on revenue, the authorities i.e. Assistant Excise and Taxation Commissioner as well as Excise and Taxation Commissioner merely stated that the issuance of refund order is likely to adversely affect the recovery. This satisfaction was recorded without any material on record which could justify the opinion formed by the authorities on that account. To counter this contention, counsel for the petitioner submitted that in the facts and circumstances of the present case, this satisfaction cannot possibly be recorded as the petitioner is a company which is having annual turn-over of more than Rs. 50 crores and is regularly working.

While dealing with the similar issue regarding refund of the amount of tax paid by an assessee as a pre condition for entertainment of an appeal, this Court in Civil Writ Petition No. 19172 of 2006 (M/s Ratti Woolen Mills Vs. State of Punjab and others) decided on February 01, 2007 while rejecting the plea of the State regarding withholding of the tax, has directed the respondents therein to refund the amount along with statutory interest.

In view of our above discussions, the writ petition is allowed. Order

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dated 17.1.2007 Annexure R-3 is set aside. The respondents are directed to refund the amount of Rs. 1,57,93,514/- along with statutory interest within a period of three months from the date of receipt of a certified copy of this order.

The writ petition is disposed of in above terms with no order as to costs.

(Rajesh Bindal)
Judge

February 6,2007 **(M.M.Kumar)**
Pka **Judge**